No. 95-1869

Supreme Court, U.S.
FILED
JUL 2 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

LEO A. DAMMER,

Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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RESPONSE TO STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

Petitioner, Leo Dammer, relies on facts previously submitted, but must address the Statement of Facts and Summary of Mercedes-Benz of North America (MBNA).

Petitioner does not question *per se* the reduction-in-force due a downturn of new car sales. Petitioner was the Import Supervisor for twenty years for the department that provided parts for all years of MBNA automobiles throughout the country and was not involved with selling new cars. MBNA offered no evidence to dispute petitioner's contention that the parts division was not impacted. MBNA evaded the fact that petitioner's duties dealt solely with parts and not the sale of new cars.

MBNA states that petitioner offered "no evidence whatsoever to contradict statistical evidence". But, petitioner claimed intentional disparate treatment and not facially neutral disparate impact requiring a statistical analysis.

MBNA admits that the essential functions of petitioner, Mr. Dammer, were assigned to the remaining employees (some substantially younger) in the parts department. Thus, MBNA admits that there was not a total elimination of petitioner's job. Although petitioner's title was eliminated, petitioner's duties were shifted to younger, less qualified employees.

MBNA characterizes as a "bald assertion" petitioner's claim that a decision had already been made to replace him with Kay-Wohl Ahlden (Ahlden) a 28-year old, much younger male employee, from Germany at the time petitioner was considering the early retirement package. Such a claim is hardly "bald" when MBNA admitted that contemporaneously with the offer of early retirement between August and October 1990, plans were in place to hire Ahlden who was officially hired as a new hire

according to personnel records effective April 1, 1991. Furthermore, between August and October 1990, petitioner was approached more than once before the deadline concerning early retirement. Agents of MBNA admitted that they wanted to replace petitioner if he chose early retirement which would have been effective January 1, 1991. The evidence presented by both parties creates strong inferences that MBNA had Ahlden in mind as petitioner's replacement and MBNA was disappointed that petitioner declined the incentive to retire. Ruppert and Ahlden admitted that there was no paper trail regarding Ahlden's recruitment.

Petitioner's manager and decisionmaker Ernst Ruppert (Ruppert) visibly showed his displeasure when petitioner declined early retirement in October 1990. Then, Ruppert displayed retaliation and created a hostile environment around petitioner causing him great stress by ignoring him, belittling him, subjecting him to unfounded criticism, excluding him from important meetings and information, taking away his main duties and assigning such duties to the new hire, 28-year old Ahlden.

Ahlden, in turn, added to this hostile environment and Ahlden's actions against petitioner were ratified by Ruppert. After Ahlden was hired and continuously thereafter, Ahlden began taking over petitioner's main duties including the important function of visiting different locations around the country where parts were imported. Ahlden would appear in petitioner's work location, ignore petitioner and give orders to petitioner's staff and undermine petitioner in front of his staff. Petitioner complained to Ruppert in vain.

It shocks the conscience how MBNA misrepresented the facts below and continues to do so to this Court by, for example, stating "Mr. Dammer [petitioner] specifically admits that Ahlden was his superior because he [Ahlden] 'ran the

department'." Petitioner was expressing his dismay that Ahlden had usurped petitioner's duties with no explanation, certainly not that Ahlden was petitioner's superior.

The working environment had become so stressful that petitioner felt that MBNA wanted to force him to quit or justify a termination if petitioner could no longer perform under such circumstances. As it turned out, decisionmaker Ruppert used the opportune reduction-in-force as the pretext for the termination.

MBNA shielded Ahlden's true employment history from the EEOC by listing Ahlden with other employees as a regular employee in the United States since 1985 instead of having been hired in 1991, close to the time when petitioner was targeted for termination. The EEOC chose to believe MBNA and did not address the Ahlden issue despite petitioner's affidavit. The EEOC focused on disparate impact based on the statistics provided by MBNA and summarily dismissed petitioner's claim. App. 29a-31a.

MBNA's assertion that petitioner did not know when the reduction-in-force was formulated is irrelevant since petitioner is claiming intentional discrimination and does not question the reduction-in-force due to low new car sales. The uncontradicted evidence proves that Ruppert targeted petitioner for termination in July 1991 not one week prior to termination as MBNA is attempting to convey.

MBNA bases the strength of its case by relying on facts that petitioner:

> Testified that no one tried to influence his decision regarding early retirement; (However, Eric Lenz who approached petitioner because Ruppert was "after him to find out" overly stressed the point that he (Lenz) was not supposed to influence petitioner.)

> No one in his department said anything to him which led him to believe that he would be forced out of the department if he declined early retirement; and
>
> Never heard anyone say anything that led him to believe that his superiors were trying to get rid of him.

Surely, employers are not so direct. This is another effort by MBNA to dictate petitioner's claims as either disparate impact and/or direct evidence of discrimination when this case is about intentional age discrimination based on circumstantial evidence.

As if fatal to petitioner's claim, MBNA asserts that:

> petitioner never complained to MBNA that he was a victim of age discrimination before his termination, or on the date of his termination, or after he was terminated.

Even if true, whether the petitioner did or did not use the actual words, age discrimination, to MBNA is immaterial. In any event, petitioner attempted to utilize the so-called Open Door Communications policy of MBNA and to discuss his concerns to Ruppert about Ahlden's actions but was rebuffed.

Again, MBNA's statements "that Mr. Ahlden did not assume any of Mr. Dammer's job duties" and that Ahlden's position was unrelated to that of petitioner's are absolutely not true. First, Ahlden admitted that in Germany he worked in the ocean freight shipment of parts. Ahlden further admitted that he did visit locations around the country beginning in May 1991. Petitioner for years had the responsibility of visiting these locations. Ahlden admitted that he did perform petitioner's function of dealing with steamship companies, airlines, customs, house brokers, and freight forwarders.

MBNA in contradiction states that Ahlden was a contract employee for a limited time. But, MBNA admitted in the personnel files provided below that Ahlden was hired April 1, 1991 as a "new hire" and "permanent" employee. And, for the EEOC, MBNA listed Ahlden as an employee in the United States since 1985.

MBNA grasps at alleged comments by petitioner as "Ruppert didn't like anyone working for him who was older" so as to trivialize the case. Petitioner did not rely on such impressions.

MBNA resorted to trick questions, as whether petitioner believed a company has the right to reduce staff. No matter what answer was elicited, MBNA was prepared to use the answer against petitioner. The petitioner rightly did believe that the company should have retained him rather than hire and retain younger less qualified employees and shift petitioner's duties to them.

In its summary, MBNA reiterates its statistical analysis of ages of those employees terminated and of those retained as if it were enough to prevail. MBNA asserts that petitioner provided only subjective conclusions. Yet, MBNA itself, *inter alia*, admits that petitioner's duties "were absorbed by the remaining staff" and Ahlden admits he performed petitioner's main duties.

I. THE IMPORTANT QUESTIONS PRESENTED ARE NOT MOOT SINCE THIS COURT'S DECISION WOULD RESULT IN "SPECIFIC RELIEF" TO ONE OF THE PARTIES IN INTEREST.

MBNA tells this Court that it lacks jurisdiction to grant the Petition for Writ of Certiorari because the questions presented

are moot and "the decision of this Court would not affect the rights of the litigants before it". *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971). MBNA's argument demonstrates precisely why these questions are not moot. This case is "a real and substantial controversy", an actual case, with real facts that generate questions of national importance for this Court to consider. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 463-64, 81 L. Ed. 617 (1937).

If the courts below had ruled in favor of petitioner *arguendo*, MBNA would still be arguing mootness because the courts had found no *prima facie* case of discrimination.

The Circuit Court using a strict version of the McDonnell Douglas model ruled that petitioner did not create an inference of unlawful discrimination because he "has not demonstrated any new employee was hired to replace him".

In finding that petitioner did not establish a *prima facie* case of discrimination the Circuit Court focused on the date of the termination rather than the competent evidence presented by petitioner beginning from the day he refused early retirement, a year earlier and the age animus to which petitioner was subjected. Petitioner's first question to this Court involves age animus prior to the termination as demonstrated in this case.

In its further analysis, like the district court, the Circuit Court focused on a stray remark "age before beauty" provided by MBNA and ruled that a single comment does not demonstrate direct evidence of discriminatory motive. But, petitioner does not rely on any such comment at all in his case and attempted to convey that to the courts! This comment provided by MBNA trivialized petitioner's case in the eyes of the courts.

MBNA, in attempting to justify to this Court its inclusion of the "age before beauty" comment, contends (as if done in petitioner's favor) "that MBNA raised the issue because it was the *only* circumstantial evidence identified by Mr. Dammer". However, the courts below latched on to this very comment "age before beauty" as petitioner's proffer of direct evidence and made it an important part of their analysis. App. 8a, 23a. Moreover, almost identical opinions below reflect inferences in the light mot favorable to the defendant rather than plaintiff.

Hopefully this Court will find that cumulative evidence of age animus prior to petitioner's termination is sufficient to establish a *prima facie* case and create an inference of age discrimination.

Then, petitioner can proffer competent in-depth evidence connected to the past discriminatory actions to rebut MBNA's reason for the termination. Thus, the lower courts' decisions would rest on the proper merits of the case rather than MBNA's proffer of "age before beauty" and statistics.

II. DESPITE MBNA'S STATISTICS, PETITIONER HAS SHOWN AND MBNA HAS ADMITTED THAT YOUNGER EMPLOYEES WERE RETAINED WHO TOOK OVER PETITIONER'S DUTIES AND CONSTRUCTIVELY REPLACED HIM.

As indicated previously, petitioner does not and has never *per se* questioned MBNA's reduction-in-force due to a downturn in new car sales and sees no relevance to the statistical evidence. Again MBNA is attempting to confuse petitioner's claim of disparate treatment with disparate impact.

MBNA relies on its statistical evidence to show that "employees over 40 faired better than did younger employees"

which petitioner does not dispute. "Numbers are numbers, they speak for themselves," as MBNA asserts.

Moreover, MBNA admits that "both courts below relied upon that uncontroverted statistical evidence in concluding that Mr. Dammer could not establish a *prima facie* case of age discrimination. Petition at App. 7a, 23a.

This proves that the courts did not consider individual disparate treatment which characterizes petitioner's case.

In *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 643 (5th Cir. 1985), in reversing the granting of defendant's motion for summary judgment in a "reduction-in-force case" the Fifth Circuit noted that the plaintiff did not have to rely on any remarks concerning age and did not offer statistical evidence. But, plaintiff offered proof that several younger, allegedly less-qualified employees were retained. The *Thornbrough* court stressed that in a reduction-in-force case that it is not the discharge alone but discharge itself coupled with the retention of younger employees that creates the inference of discrimination.

The fact that petitioner's duties remained but he, the most qualified to do the job, was fired should make this Court wonder. MBNA has admitted that petitioner's duties were absorbed by other younger employees.

As in *Montana v. First Federal S&L of Rochester*, 869 F.2d 100, 105-06 (2nd Cir. 1989) which overturned summary judgment, no options to remain were given to plaintiff whose responsibilities were reassigned to younger employees.

This shifting of duties to younger employees whether during a *bona fide* restructuring or under the pretext of "job elimination" to justify termination of older employees should

not go unnoticed by this Court. Such evidence of shifting of duties could easily fit in the fourth prong of the McDonnell-Douglas *prima facie* case as a constructive replacement by younger employees. MBNA has ignored this shifting in its opposition.

III. PETITIONER THROUGHOUT HIS PETITION HAS CHALLENGED THE FINDINGS OF THE COURTS BELOW IN SUPPORT OF HIS QUESTIONS TO THIS COURT. A SEPARATE QUESTION WAS NOT NECESSARY.

Petitioner has challenged MBNA's version of the facts and the courts' decisions below throughout his petition and reply.

In Issue III, MBNA continues to provide this Court with unsubstantiated and conflicting versions of the facts to prejudice petitioner's case. For example, MBNA is trying to give the impression that the courts below considered the issues now presented. MBNA, again, is attempting to convince this Court that petitioner's claim was based on direct evidence by stating "Mr. Dammer could not point to no direct evidence of discrimination." MBNA relies on petitioner's alleged impressions that Ruppert had a "premeditated plan" to get rid of older workers and replace them with younger employees. Petitioner admits Ruppert had a premeditated plan to replace him with Ahlden before the reduction-in-force.

This Court's review of the opinions below will reveal almost identical opinions based on statistics and disparate impact and the notorious "age before beauty" statement magnanimously proffered by MBNA. The important genuine material facts were not considered by the courts possibly because evidence of the pretermination age animus and/or shifting of duties to establish a *prima facie* case is not established law in the Third Circuit.

The *prima facie* case must be resolved first in the context of the Questions Presented before any pretext analysis.

Petitioner believes that the confusion and conflicts in the Circuits regarding *prima facie* cases will be lessened and qualified older workers will be better protected under the ADEA if this Court grants this Writ of Certiorari.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, this Court should grant the Petition and set aside the decision of the Third Circuit.

Respectfully submitted,

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